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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,

Respondents.

STANLEY WILKINSON,

Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

COUNTY OF YAKIMA, *et al.*,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR CITIZENS EQUAL RIGHTS ALLIANCE, INC. (CERA), BIG ARM MONTANA, AS AMICUS CURIAE, A NATIONAL COALITION IN SUPPORT OF PETITIONERS

(Coalition Members on Inside Cover)

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INTEREST OF AMICUS CURIAE

Amicus Curiae Citizens Equal Rights Alliance, Inc., Big Arm, Montana, is a national volunteer non-profit organization incorporated under the laws of the State of Montana. It is a coalition of citizens groups and individuals from fourteen (14) states who are concerned and alarmed at the direction federal Indian policy has taken, especially how tribal governments and some courts have interpreted and molded that policy. The over four hundred thousand (400,000) people from all walks of life who make up the Citizens Equal Rights Alliance, Inc. are dedicated to effecting positive change in federal Indian policies. They are concerned with the problems associated with the exercise of tribal civil jurisdiction over non-members of the tribe who are not allowed any representation in the government that seeks to govern them. And while the members of this organization seek responsible change in this system, they often bear the stigma of racism for opposing any extensions of tribal power.

Totally Equal Americans is an association of individuals residing and working on or near reservations in nine (9) states, with its headquarters in Waubun, Minnesota. These citizens sense the frustration and suffer a lesser quality of life from the imposition of tribal regulations and taxes in areas such as water rights, hunting and fishing, zoning, and employment. They are also concerned how this expansion of tribal power has affected their rights under the 5th and 14th Amendments to the United States Constitution, guaranteeing them "equal protection".

Protect Americans' Rights and Resources has a national membership of nearly five thousand (5,000) people, consisting of business people, fee land holders, farmers, utilities, business organizations, and outdoor recreationists. One of the specific concerns of this organization is the granting of special privileges to tribal members who do not reside on reservations. The Chippewa Indians of Wisconsin, for example, now claim a superior right to

timber, hunting, and fishing in Northern Wisconsin, whether located on a reservation or off a reservation.

The Tulaby Lake Association and White Earth Equal Rights Committee, Inc., are groups of citizens who live on or near the former White Earth Reservation in Northern Minnesota. These organizations are made up of resort owners, farmers, business people, property owners, and outdoor sportsmen.

United Townships Association is an organization of thirty-two (32) township governments also within the original boundaries of this Reservation. One of the concerns of these groups in this area is the difference in fishing regulation between members and non-members and the associated law enforcement problems. Also, the White Earth Reservation Tribal Council, in 1981, passed Ordinance Eight, a natural resources preservation act, which applied to all individuals. Although that particular ordinance was later ruled invalid by the Department of the Interior, this is a clear example of how Indian tribes are seeking to increase their power.

New York State Conservation Council is a group of fee land owners, outdoor sportsmen, local elected officials, and business people. These individuals face land claims from various Indian tribes in New York and the certain extension of tribal rule and regulation to their personal and professional lives.

Interstate Congress for Equal Rights and Responsibilities is a national non-profit group headquartered in Washington state. Their interests, given the location of this case, is as obvious as is their concern for the expansion of tribal claims.

North Dakota Committee for Equality is a non-profit organization organized under the laws of the State of North Dakota. The membership of this organization include farmers, business owners, teachers, and fee land owners who reside on or near the original Fort Berthold

Reservation in North Dakota. Part of the original Reservation, three hundred sixty-five thousand (365,000) acres in total, lies in portions of three North Dakota counties. Of this acreage, less than one percent is owned in trust. For years the Fort Berthold Tribal Constitution contained a provision restricting the civil jurisdiction of the Tribe to tribal members. However, that provision has now been repealed. Consequently, the members of this organization are now claimed to be subject to tribal civil jurisdiction, subject to the ruling of this Court.

All Citizens Equal is an association of over 1,000 members, primarily resident and non-resident fee land owners within the "former" Flathead Reservation of Western Montana. The land owners are principally farmers and ranchers, orchard owners, small business owners, retirees, and resort owners. Membership also includes non-resident land owners and sports enthusiasts. They utilize private and state land for recreation including hunting and fishing, and other sports on Flathead Lake. For years, land in the area was known as being on the *former* Flathead Reservation. Yet, the Confederated Salish and Kootenai Tribes have and continue to expand their claim in non-members' lives through a burdensome number of lawsuits. For example, the Confederated Tribes passed Ordinance No. 87-A, the Aquatic Lands Conservation Ordinance, which would require the acquisition of permits and payment of fees for construction of any project on or near wet lands anywhere on the Flathead Reservation, even though the Reservation population is eighty-five percent (85%) non-members and eighty-five percent (85%) of the land is owned in fee. Moreover, this Tribe has summarily rejected *Montana* and continues to claim exclusive hunting and fishing jurisdiction on private land.

Citizens Rights Organization has a membership of farmers, ranchers, and small businesses in Big Horn County in Eastern Montana. Their area is in the original Crow Reservation. Approximately fifty percent

(50%) of the land is owned in fee by non-members. The Crow Tribe has and is currently seeking to levy taxes on non-members residing on the Reservation. They have also attempted to regulate the use of farm chemicals, insecticides, and herbicides on fee land on the Reservation.

East Slope Taxpayers Association is a non-profit group of fee land owners, farmers, ranchers, business owners, sportsmen, and conservationists who reside or recreate on the original Blackfeet Reservation in Northern Montana. Civil jurisdiction problems have all but stopped lending agencies and insurance companies from doing business on the Blackfeet Reservation. Oil companies have all but ceased to drill or pump oil. A tribal liquor license is one thousand dollars ($1,000.00). The Blackfeet Tribe is attempting to control the sale of tax-free cigarettes and gambling. The Tribe has also imposed a four percent (4%) possessory interest tax on utility companies, railroads, and oil companies, with the formula based, in part, on holdings outside the Reservation. The local Rural Electric Cooperative reluctantly passed this tax on to the local consumers in the form of a one dollar ninety cent ($1.90) surcharge.

Samuel E. Davis is an individual member of *Amicus* Citizens Equal Rights Organizations, Inc., who resides in and is Mayor of Parker, Arizona. Parker is surrounded on three (3) sides by the Colorado River Reservation and on the fourth side by the Colorado River. In 1983 the Colorado River Indian Tribes filed suit to have the city stop its enforcement of the city building codes on tribally held lots in Parker. Further conflicts have since generated on liquor licensure, zoning, business and health permits, and law enforcement. Since these tribal power expansions, the quality of life in Parker has deteriorated. The Tribe also has imposed a tribal boycott on Mr. Davis' businesses due to his stand as Mayor in these disputes.

Concerned Citizens Council consists of resident and non-resident fee land owners, farmers, and businessmen

who reside on the original Omaha and Winnebago Reservations in Thurston County, Nebraska. The Omahas were retroceded jurisdiction in 1969 and the Winnebagos in 1986. The concerns of this organization are what they perceive to be well settled legal principles, are foreign concepts in federal Indian law, for example, statutes of limitation.

The Omaha Tribe is also suing to regain jurisdiction and title to land across the Missouri River in Monoma County, Iowa. If such a suit is successful, members of Monomo County Land Association would be claimed to come under tribal civil jurisdiction. The members of this Organization, landowners, farmers, and businesses who have been in this area of Iowa for at least a century, would then be subject to a system, totally foreign to them, in which they have no representation.

West Valley Watch, Inc., a volunteer non-profit corporation organized under the laws of the State of Oregon, consists of landowners, farmers, and business owners also concerned with the effects of a formation of a new reservation in their area. The creation of a new nine thousand eight hundred (9,800) acre reservation for the Confederated Tribes of Grand Ronde in Western Oregon would subject the members of this organization to claims of tribal civil jurisdiction. Once again, people who have lived in an area for several years are suddenly being thrust into a governmental system totally unknown to them.

James L. Mitchell is also an individual member of the *Amicus* Citizens Equal Rights Alliance, Inc., who resides in Jemez Pueblo, New Mexico. Mr. Mitchell is typical of those who are deeply interested and concerned with the continuing expansion of the tribes and pueblos of New Mexico and Arizona. Extensive litigation has taken place between the federal government, the tribes, and individual land owners in the area of water rights. Also efforts

are being made by the Sandia Pueblo to reclaim nine thousand four hundred (9,400) acres they maintain was deprived of them by an erroneous 1859 survey. They are also concerned with the expanding efforts of the tribes to tax and assert tribal jurisdiction over non-member individuals and businesses, outside of the Navajo Reservation.

Cheyenne River Landowners Association is a group of farmers, ranchers, business owners, and local elected officials in Dewey and Ziebach Counties in South Dakota. These people are fully aware of what can happen when tribal jurisdiction is suddenly thrust upon them, and mirror others who we put in the same situation. Until this Court's decision in *Solem v. Bartlett*, 465 U.S. 463 (1984), portions of the Cheyenne River Sioux Reservation were not considered Indian country. 18 U.S.C. 1151. After the decision in that case, the Cheyenne River Sioux Tribe has greatly expanded its efforts to govern non-members. The Tribe has passed a Tribal Employment Rights Ordinance (TERO), which requires an excise tax, and Indian preference in employment, hiring and contracting, whether the project is on trust or fee land.

The Cheyenne River Sioux Tribe has also been active in the area of liquor licensure. The Tribe passed Ordinance No. 48, the Alcohol Beverage Control Law, applying the Ordinance expressly to all lands, whether trust, allotted, or fee lands, repealing an earlier ordinance which only applied to "Indian land". The Tribal Ordinance was approved by the Department of the Interior on June 2, 1988, and is found at 53 Fed. Reg. 20,179-20,182. The Assistant Secretary for Indian Affairs, Ralph R. Reesen, noted at 53 Fed. Reg. 20,179-20,180:

> Section 1-1-2 and 1-1-3(B) apply to [the] tribal liquor ordinance to all lands within the reservation boundaries. There is no reference to the two exemptions to the tribe's jurisdiction as described in 18 U.S.C. 1154(c). However the existence of land entitled to either of the two exemptions, fee patent lands in non-

> Indian communities or rights of way through Indian reservations, is a factual determination to be decided by the Courts.

The Tribe has since filed a number of lawsuits in the Cheyenne River Sioux Tribal Court to enforce this ordinance. This is done in spite of the Assistant Secretary's statement, in spite of the existence of 18 U.S.C. 1154(c), in spite of the existence of *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980) and *United States v. Mission Golf Course, Inc.*, 548 F. Supp. 1177 (D.S.D. 1982), and in spite of a By-law provision in the Cheyenne River Sioux Tribe Constitution By-laws, Article IV, Section 1(c), which limits the jurisdiction of the tribal courts over non-members to instances where the member and non-member litigants *stipulate* to the jurisdiction of the tribal court. The Cheyenne River Sioux Tribe has also put in place a tribal boycott of businesses in municipalities which do not follow their liquor control ordinance. This is all done in the name of "inherent tribal sovereignty".

The Cheyenne River Sioux Tribe has also made attempts to collect a tribal business license fee from business owners on the Reservation, including from present counsel of record. Once again these efforts to collect a tax are done in spite of the Tribal Constitution and By-laws.

The people who make up the membership of *amicus* fall into several categories. Many of the people have lived in these areas for all their lives, some are the second or third generation in the area. Others, while not in the area for as long, nonetheless rely on the area for their livelihood. Other members of *amicus*, while they do not actually live on reservations, work or conduct business on the reservation. Still others enjoy the vast recreational opportunities available. Yet, all these people face the prospect of ever increasing tribal civil jurisdiction, unless it is checked by this Court.

There are similar threads which weave together the common interest of the *amicus*. First, nearly all the ordinances, either passed or proposed, by various Indian tribes across the country say on their face that the action taken or proposed is done to regulate conduct which has a direct impact on the political integrity, economic security, or health or welfare of the tribe, thus parroting the language contained in *Montana v. United States*, 450 U.S. 544, 566. The tribes have taken one paragraph of dicta in *Montana* and literally attempted to mushroom their power into every conceivable facet of the lives of non-members living on reservations and individuals who do not reside on reservations but conduct their business or recreational activities on reservations. Until the matter is further defined or restricted by this Court, the tribes will continue to test the boundaries.

The other thread of common ground which holds the *amicus* together is their shared frustration as to their inability to effect positive change within tribal government. One might say that this is very similar to an American who resides in a country overseas. There is one important distinction, however. An American citizen who resides overseas can, if he so chooses, give up his American citizenship and seek the citizenship of the country in which he lives. American citizens who live on tribal reservations within this country, do not have that ability. Tribal membership is severely limited by blood quantums. Moreover, *Amicus* feels that the only protection they have from the increasing efforts of tribes to govern them is the courts.

Further, *amicus*, whatever their race, look at their issues as lay people. As lay people they do not understand (nor do some lawyers) the complicated legal issues involved in cases such as these which bring such confusion to their lives. They can, however, comprehend the distractions which these issues bring into their lives. They see how these issues impair and reduce the quality of life.

Also, they see these issues as individuals, and not in the light of local, state, or tribal governments.

Finally, *amicus* fully realizes that unbridled zoning can deprive them of the use of their land and further depreciate its value. They also fully realize under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), they cannot seek compensation from a tribal government for such a zoning. This cannot be what Congress envisioned.

SUMMARY OF ARGUMENT

The Yakima Nation does not have inherent civil jurisdiction over non-members living on fee lands within the Yakima Reservation.

The Ninth Circuit misinterpreted *Montana v. United States*, 450 U.S. 544 (1981), and ignored the vital precedents *Montana* used as the framework for its opinion (i.e., *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)). A careful review of these cases by the Ninth Circuit would have made it recognize several important principles essential in determining the instant issue. First, the Ninth Circuit would have had to recognize the reduced reliance that courts should give to "platonic notions of Indian sovereignty". Tribal sovereignty over non-members should be analyzed in terms of the "tradition of sovereignty", which is defined in the "shared presumptions" of various branches of the federal government. The Ninth Circuit would have had to have found that there is no such "tradition of sovereignty" over non-members.

The *Montana* Court stated that inherent sovereign powers of Indian tribes do not extend to non-members except in two situations. The Ninth Circuit erred by seizing upon these exceptions and molding them into the "rule". It disregarded the very framework of these exceptions and gave the second *Montana* exception (regard-

ing situations which threaten the existence of the tribe or livability of a reservation) such an expansive reading so as to negate significant remaining language in the *Montana* opinion.

Furthermore, the Ninth Circuit applied the federal pre-emption test in an erroneous manner. The question is whether any specific federal legislation gave the Yakima Tribe jurisdiction over non-members, thereby pre-empting state or county jurisdiction. Federal pre-emption must be found in a comprehensive federal scheme in a particular field. Only after such federal pre-emption is found can there be any balancing of state interests against Indian interests. The Ninth Circuit made only a cursory examination of such a federal regulatory scheme and could only come up with general legislation on various disparate subjects. It erroneously held such marginally related legislation pre-empted state jurisdiction over non-members. It then prematurely went on to balance the interests of the Yakima Nation with those of the county. The Ninth Circuit further erred in that the court only balanced a myopic version of county interests. It disregarded present and future county interests beyond the specific proposed uses of Brendale and Wilkinson.

In contrast to the Ninth Circuit's strained attempt to find federal pre-emption, it chose to simply ignore the federal legislation (i.e., General Allotment Act of 1887, 24 Stat. 388) which indicated an affirmative attempt to *preclude* tribal regulation of non-members. The General Allotment Act was addressed in great detail in *Montana*, which found from it a congressional assumption that tribes did not have and should never have jurisdiction over non-members.

Finally, by ignoring precedent and the United States Constitution, the Ninth Circuit placed non-members under a regulatory system that is not subject to all the constraints of the United States and under which they have no representation. In effect, it incongruously deprived

United States citizens of constitutional protections, but yet granted Indian tribes power inconsistent with the tribe's dependent status on the United States.

Zoning, if too restrictive, could constitute a taking of the use of non-member land. However, under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), such non-members can not gain compensation from the tribal government for such a taking.

ARGUMENT

I. THE YAKIMA NATION DOES NOT HAVE INHERENT CIVIL JURISDICTION OVER NON-MEMBERS LIVING ON FEE LANDS WITHIN THE YAKIMA RESERVATION.

A. The Ninth Circuit Misinterpreted the *Montana v. United States* Decision and Ignored Vital Precedent.

The Ninth Circuit, as well as some other post-*Montana* courts and Indian tribes all over the nation, seized upon certain wording in this Court's *Montana* opinion and turned the general analysis of that opinion on its head. Instead of starting with the premise that tribes in general were divested of their jurisdiction over non-Indians, the Ninth Circuit and various tribes assume the existence of such jurisdiction and put the burden on non-Indians to prove why such jurisdiction should not exist. That kind of analysis ignores the thrust of *Montana*, and a host of very real practical problems have resulted and will result if the Ninth Circuit is not corrected.

Montana dealt with the same kind of question as is in this case: whether a tribe has the power to regulate civil activities by non-members on fee land within a reservation. Ultimately the court said that no such tribal power existed. The primary analysis of *Montana* also addressed the issue presented in this case: whether inherent tribal sovereignty was an appropriate basis on which to find tribal power over non-members. As in *Montana*, there is

little real argument here that some particular treaty or statute gave the Yakima nation the power to regulate, control fee land development, and ultimately punish non-members in a civil law context.

The framework which guided the *Montana* court's analysis was the framework set out in *United States v. Wheeler*, 435 U.S. 313 (1978), and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Both the *Wheeler* and *Oliphant* cases discussed the issue of tribal authority over non-members in detail. *Wheeler* concluded that by virtue of their original incorporation into the United States, tribes lost some of their original attributes of sovereignty, including "those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326. In citing *Oliphant*, the *Montana* court concluded that "[t]hough *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities on non-members of the tribe." 450 U.S. at 565.

Oliphant and *Wheeler* have been followed consistently and are good law. They remain as the most extensive analyses of the thorny questions of tribal jurisdiction over non-Indians. No decision in the present case can be made without a serious review of the reasoning of those cases. The Ninth Circuit made no attempt at such review. If it had, it would have had to recognize the reduced reliance that modern courts should give to "platonic notions of Indian sovereignty" and the increased importance of analyzing jurisdictional issues in terms of applicable federal treaties and statutes. *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). It would also have had to analyze Yakima's powers over non-members in terms of the tradition of its sovereignty, which in turn was defined by the "shared presumptions" of the various branches of the federal government. *Oliphant*,

435 U.S. at 206. *See also Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 153 (1980).[1] The Ninth Circuit further would have had to acknowledge that the tradition of sovereignty, or shared presumptions of the branches of the federal government, all pointed to the fact that tribal jurisdiction over non-members was almost universally denied, that until recently few tribes even had court systems, and that no congressional action has granted tribes civil power over non-members. *See, e.g., Oliphant*, 435 U.S. at 201-06.

Finally, had the Ninth Circuit recognized *Oliphant* and *Wheeler*, it would have considered the rights of non-members to be protected from a regulatory system that might have no relationship with the United States Constitution or commonly accepted principles of American procedural and substantive justice. The Supreme Court has readily acknowledged that tribal governments and judicial systems "are in many ways foreign to the constitutional institutions of the federal and state governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). Tribal governments and court systems also are not subject to the constraints of the United States Constitution. *Id.* at 56. Even under the Indian Civil Rights Act (25 U.S.C. §§ 1301-1303), which does not incorporate all constitutional protections, there is no civil law remedy for violations—only the remedy of habeas corpus is available. *Id.* at 65, 72.

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[1] The analysis of "inherent authority" recommended by Mr. Justice Rehnquist in the *Washington* case (447 U.S. 134, 176-90) is appropriate. Such an approach entails examining the "tradition of sovereignty" with regard to the tribal regulation of non-members on non-member lands. The tradition would indicate that tribal regulation of non-members on fee lands has not been historically accepted or exercised. After the "tradition" has been examined, it will be appropriate to review relevant treaties and statutes to determine whether Congress expressly altered that tradition. If Congress did not so alter the tradition, then the courts should not grant the tribe civil jurisdiction over land use by non-members on fee lands.

The *Oliphant* decision reviewed the history of the reasons for traditional lack of authority over non-members and concluded:

> But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizents be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep No. 474, 23d Cong., 1st Sess., at 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

Oliphant, 435 U.S. at 210. The powers of a tribe to confiscate property, to severely restrict the use of private fee land, to restrict freedom of movement over territory that is not Indian owned, and to punish non-members with fines or even arrest (as in, for example, civil contempt proceedings) are precisely the potential "intrusions on [non-members'] personal liberty" that the *Oliphant* court determined were given up by tribes "except [to be exercised] in a manner acceptable to Congress." *Id.* at 210.

Indeed, various Indian Tribes recognize this power, and have provided for it in their laws and ordinances. The Cheyenne River Sioux Tribe Tribal Rights Employment Ordinance provides for the seizure and sale of construction equipment to pay due excise taxes and penalties. The Aquatic Lands Conservation Ordinance of the Confederated Salish and Kootenai Tribes of the Flathead

Reservation calls for civil penalties of between twenty-five dollars ($25.00) and five hundred dollars ($500.00) for each day the violation of the ordinance continues to exist. Finally, the Intertribal Court of Appeals, in *Crow Creek Sioux Tribe v. Buum*, 10 Indian L.Rep. 6031 (Intertribal Ct. App. 1983), expressly held tribes have the power to enforce court orders through civil contempt proceedings.

Because potential intrusions on liberty are labelled "civil" rather than "criminal" does not mean that the intrusions are any less onerous. One who sits in jail for civil contempt sits in the same jail as does one who violates tribal criminal law. In fact, given the expansive reading given the term "civil-regulatory" in recent cases such as *California v. Cabazon Band of Mission Indians*, —— U.S. ——, 107 S.Ct. 1083 (1987), it would seem that even the *Oliphant* type of direct intrusions on personal liberty (*e.g.*, incarceration) could be the result of civil-regulatory jurisdiction by tribes over non-members.

Nor does it make any difference that after more than one hundred years many (but certainly not all) tribes have court systems and at least some written laws or ordinances. Until and unless Congress specifically returns it, the tribes have lost their power to regulate non-members on fee land because that power is "inconsistent with their status." *Oliphant*, 435 U.S. at 208. The return of jurisdiction over non-members must be specific because it is so fundamentally important. It is absurd to find such power by implication (as the Ninth Circuit hints in this case below) from statutes such as the Indian Financing Act of 1974 or the Indian Child Welfare Act of 1978. *See* 828 F.2d at 533.

The United States government has a paramount sovereign interest in making sure that the constitutional institutions of the federal and state governments are made available to its non-Indian citizens. This is especially true because this United States government was respon-

sible for opening up reservations and inviting non-Indians to reside thereon. Justice White, in his dissent in the *Santa Clara Pueblo case*, quoted the purpose of the congressional Indian Civil Rights Act as being "to insure that the American Indian is afforded the broad constitutional rights secured to other Americans." 436 U.S. at 72. The Ninth Circuit's ruling in this case has the peculiar result of interpreting federal statutes and law so as to *remove* those constitutional rights from those "other Americans" who Congress (and the Court) assumed were fully and properly protected.

The *Oliphant* court as well as earlier courts recognized the dangers of subjecting people of one sovereign to the courts of another. *Oliphant* cited the early case of *Ex parte Crow Dog*, 109 U.S. 556 (1883), as an example. *Ex parte Crow Dog* involved the question of whether, prior to the Major Crimes Act, federal courts had jurisdiction over offenses by Indians against Indians on reservations. The Court refused to extend federal jurisdiction saying that, without statutory mandate, the United States was trying to extend its law:

> by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . .; which judges them by a standard made by others and not for them. . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception. . . .

109 U.S. at 571, quoted in *Oliphant*, 435 U.S. at 210-11. The above words could have been written with reference to the present case.

The Ninth Circuit misread the main emphasis of *Montana*, ignored *Oliphant* and *Wheeler*, and disregarded the

constitutional protections to which non-members of a tribe are entitled. This Court should correct the Ninth Circuit's reasoning, much as it had to do in *Montana*, *Wheeler*, and *Oliphant*.

B. The General Allotment Act and Other Laws Opening Up the Reservations to Non-member Settlement Restricted Any Authority the Tribe Might Originally Have Had Over Non-members.

The *Montana* decision teaches that the general rule in matters such as the present one is that notions of "inherent sovereignty" do not give tribes jurisdiction over non-members. That should also be the starting point in the present case.

The next question should be whether the Ninth Circuit could identify any specific federal legislation which gave the Yakima tribe jurisdiction over non-members. The Ninth Circuit could identify no such legislation. The best it could come up with is citation to general legislation encouraging tribal governments *in programs involving their members* in areas such as child welfare, education, and financing. Such statutes are so marginally related to the present issue as to be of virtually no assistance.

The final question is an analysis of the Yakima issue should be whether any federal legislation has indicated an affirmative intent to *preclude* tribal regulation of non-members. The Ninth Circuit ignored this inquiry. The *Montana* court, however, addressed this question in detail. The court found that the General Allotment Act of 1887 (24 Stat. 388) and subsequent allotment acts which opened up reservations demonstrated a congressional assumption that tribes did not have and should never have jurisdiction over non-members. These congressional enactments, which encourage and enabled non-members to move on to reservations, form the correct backdrop against which to analyze questions such as those posed in the present case.

The *Montana* court discussed the federal allotment acts in detail, holding that even if prior treaties had preserved some tribal jurisdiction over non-members, the allotment acts removed such jurisdiction. In an extensive footnote detailing its reasons for that conclusion, the *Montana* court said in part:

> The policy of the Acts was the eventual assimilation of the Indian population [citation omitted] and the "gradual extinction of Indian reservations and Indian titles." [citation omitted] The Secretary of the Interior and Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. . . .
>
> *There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.* Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. [citations omitted] *It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction* when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 559-60 n.9 (emphasis added).

There was no Yakima jurisdiction over non-members when the reservation was allotted and when non-members became fee owners within the reservation, and there is no Yakima jurisdiction today. No federal enactment has granted such jurisdiction to the Yakima nation in the face of the congressional policy which allowed the reservation to become allotted in the first place. The Ninth Circuit cannot change that history or congressional policy. As the Supreme Court has stated on more than one occasion, "[o]ur task here is a narrow one. . . . [W]e cannot remake history." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977).

C. The Ninth Circuit Expanded Montana's Exceptions Far Beyond Their Intent and Meaning.

In this case, the Ninth Circuit took what the *Montana* court stated to be exceptions to a general rule, and turned those exceptions into a general rule. Neither logic nor precedent support what the Ninth Circuit did.

The *Montana* court stated clearly "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. It then, however, recognized two special situations where the general rule could be altered. First is when non-members choose to become involved with a tribe by entering "consensual relationship." Presumably the non-member has a choice about whether he wants to deal with a tribe, and therefore can refuse to become a subject to tribal regulation by ending his consensual (usually commercial) relationship.

Such is not the case with non-members living on reservations who have not made any "consensual" commercial relationships with a tribe. The *Montana* court acknowledged that at some level an activity of a non-member could become so onerous as to threaten the very existence of a tribe or livability of its reservation. In such a situation, the court acknowledged that a tribe could act to protect itself. However, such a situation had to be extremely serious and was clearly an exception to the general rule. Where the Ninth Circuit went astray was when it took *Montana's* language and interpreted it as encompassing virtually any activity over which a government can exercise traditional police power.[2] Police power

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[2] The district court in the *Whiteside* case went so far as to identify perceived threats to a tribe's "cultural" and "spiritual" values as sufficient to justify tribal authority over non-Indians. 617 F.Supp. at 744. Such a reading of the Montana exception is sufficient to bring just about any conduct within the exception's terms, thereby virtually eliminating the general rule.

authority (used to promote the "general welfare") is incredibly broad, and goes far beyond situations which threaten the existence of a tribe or livability of a reservation. It makes no sense to give the *Montana* exceptions such an expansive reading because to do so would negate the *Montana* court's preceding extensive discussion of *Oliphant*, *Wheeler*, and the allotment acts.[3]

The proper interpretation of *Montana* is that tribal civil authority over non-members is precluded unless the tribe can prove that a particular activity is so onerous as to threaten its own or its reservation's existence. The Yakima nation did not, and could not, demonstrate this in the present case. The activities of non-members of the tribe are not unregulated. They are subject to state and local government regulations, constrained by principles of substantive and procedural due process, and subject to tribal action if they are particularly onerous. This Court

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[3] The *Montana* court's citations to previous authority in support of its identified exceptions certainly do not support the Ninth Circuit's overbroad reading. The *Montana court*, 450 U.S. at 566, cited *Fisher v. District Court*, 424 U.S. 382 (1976); *Williams v. Lee*, 358 U.S. 217 (1959); *Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898). In *Fisher* the court dealt with a private legal dispute involving only Indians. In *Williams* the issue was jurisdiction over a private legal dispute between a non-member and a reservation Indian. In Montana Catholic Missions the court actually upheld state taxation of cattle owned by non-members in the face of argument that such taxation would really be against Indians and should not be allowed. No claims of tribal jurisdiction were made or ruled upon. The *Thomas* case was also concerned with state taxation of cattle belonging to non-members on leased Indian land. Such a state tax was upheld. Again there were no issues involving tribal jurisdiction over non-members.

The fact that *Montana* cited only cases that either upheld state jurisdiction or involved interaction with tribal members emphasizes the point that tribal jurisdiction over non-members who are not directly involved in disputes with tribal members is an exceptional event.

should clear up the Ninth Circuit's misreading, and should re-emphasize the past reasoning and understanding of the branches of the federal government when analyzing the reglationship between tribes and non-members living on fee lands.[4]

II. IF TRIBAL AUTHORITY IS FOUND TO EXIST OVER NON-MEMBERS, THE STATE AND COUNTY MUST ALSO HAVE SUCH AUTHORITY.

If the Yakima nation is found not to have civil authority over non-members, the issue of concurrent jurisdiction (or pre-emption thereof) need not be addressed. It has traditionally and consistently been held that in general a state has jurisdiction over non-Indians *anywhere* within the state's territory, even within Indian reservations. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *Draper v. United States*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1881). As was summarized in Cohen's original *Handbook of Federal Indian Law* (1942) at 121:

> The mere fact that the focus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern.

In order for state or county jurisdiction over non-members to be removed it must be shown either (1) that the federal government has evidenced an intent to remove the state's jurisdiction (*White Mountain Apache Tribe v. Bracker*), 448 U.S. 136 (1980)) or (2) that the exercise

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[4] It is important not to confuse tribal jurisdiction over non-members who have no relationship with the tribe with tribal jurisdiction over disputes between members and non-members, or tribal jurisdiction over the activities of its members. There are stronger reasons (and more lenient tests) for finding jurisdiction when tribal members or tribal land are involved than there are when only non-members are involved.

of state jurisdiction somehow so severely interferes with the right of reservation Indians to make their own laws and be ruled by them that such jurisdiction should be disallowed (*Williams v. Lee*, 358 U.S. 218 (1959)). The Ninth Circuit once again misinterpreted these tests in pre-empting county jurisdiction in the "closed" reservation area.

The Ninth Circuit erred in applying the federal pre-emption test as discussed in the cases of *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). The *Bracker* and *Central Machinery* cases do not present a simple "balancing of interests" test and nothing more, as the Ninth Circuit implies. Rather, both of those cases make clear that federal pre-emption must still be found in a comprehensive federal statutory and regulatory scheme, even if the classic requirement of an express statement of intent to pre-empt is not necessary. It is only *after* a comprehensive federal scheme *in a particular field* has been found that an analysis of any competing state interests is required—and then only to see if the state interest is so strong as to overcome the implicit federal pre-emption. Again it must be emphasized that authority over *non-members* is at stake here, which makes it different than an analysis which deals with activities involving member Indians.

The Ninth Circuit engages only in the most cursory examination of a specific federal regulatory scheme. Rather, it cites general federal statutes such as the Indian Financing Act of 1974 and Indian Child Welfare Act of 1978. 828 F.2d at 533. The court apparently concludes that these statutes constitute a comprehensive scheme for land use management for it then goes directly to a balancing of interests test. No attempt is made to support a conclusion, such as was made in *Bracker*, that:

> the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal

> timber, where a number of the policies underlying the federal regulatory scheme are threatened. . . .

448 U.S. at 151. The Ninth Circuit apparently has concluded that general recent federal Indian legislation on various disparate subjects has in effect pre-empted state jurisdiction over non-members in all areas—without the necessity of proving comprehensive federal (as opposed to tribal) involvement. Such a conclusion is at odds with a great deal of precedent. Such a conclusion eliminates—without congressional consideration—almost all state or county jurisdiction over non-members on reservations. Such a conclusion should not be accepted by this Court.

Error was also committed below when the Ninth Circuit analyzed the potential county interest in zoning matters—an analysis which should only come into play if the court has found a comprehensive framework of federal statutes and regulations. It must be remembered that the county interests go beyond the specific proposed uses by Brendale and Wilkinson. The Yakima nation is concerned with land uses that may spill over from the fee land to affect the remaining reservation land. The county has a similar long range concern that the reservation not allow development on fee land that would spill over to affect non-reservation county land. The issue for the county goes beyond the specific uses proposed by defendants in these cases. The county's authority will not disappear or reappear depending on the specifics of a future proposal. If this Court upholds the Ninth Circuit, the county's authority is likely gone forever and as to all future proposed uses of reservation fee lands.

The most reasonable way to protect future county concerns is to also preserve county authority over reservation fee land. The Ninth Circuit ignored legitimate future county concerns when it focused only on current proposals by Brendale and Wilkinson. The court's error should not be allowed to continue.

The second barrier to state or county jurisdiction was not discussed much by the Ninth Circuit, probably because it does not apply to the present situation. *Williams v. Lee*, 358 U.S. 217 (1959), a case involving a legal dispute with a reservation Indian, stands for the rule that state jurisdiction over such conflicts with tribal Indians cannot exist when it would severely interfere with the right of reservation Indians to make their own laws and be governed by them. County jurisdiction in the present case does not affect the Yakima nation's ability to pass laws governing its own members and their conduct. County jurisdiction relates only to the activities of non-members which takes it out of situations such as those addressed in the *Williams* case. Any other interpretation would make the *Williams* test unnecessary—the court would have ruled that any state jurisdiction is prohibited because it, of necessity, would involve regulation of some kind of on-reservation conduct. No such rule has been adopted. Since jurisdiction in the present case involves only non-members, it does not fall victim of the *Williams* test.

III. ZONING BY THE TRIBAL GOVERNMENT OF LAND OF NON-MEMBERS WHO ARE UNREPRESENTED IN SUCH GOVERNMENT AFFECTS FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Mindful of not getting the "cart before the horse", it is nevertheless important at this juncture to at least address the fundamental constitutional rights potentially affected by the zoning powers of governmental units. *Oliphant*, 544 F.2d 1007, 1019 (1976) (Kennedy, J., dissenting). Since voting in tribal governments is limited to tribal members, the power and the rights involved must be closely scrutinized by this Court.

The power to zone is derived from the state's police power to promote the public health, safety, morals and welfare. 8 McQuillin, *Municipal Corporation*, § 25.34,

p. 81 (3rd ed. 1983). Also, *see generally* 1 Anderson, *American Law of Zoning* (3rd ed. 1986). When authorized by the state constitution, a specific statute or general enabling legislation, zoning powers of the state may be delegated to municipalities and other political subdivisions or units of local government. The enactment of a zoning ordinance is "an exercise of legislative power residing in the state." 8 McQuillin, *Municipal Corporations* § 25.54, p. 139.

In general, zoning measures must observe fundamental guaranties of personal or property rights protected in federal or state constitutions. For example, such zoning measures must observe equal protection and due process of the laws. 8 McQuillin, *Municipal Corporations* § 25.05, pp. 12-13. "Moreover, zoning ordinances must conform and not conflict with enabling statutes or state conferred rights of eminent domain." *Id.*

Under ordinary circumstances, zoning ordinances will not be struck down unless they are discriminatory, oppressive or excessive. *See generally Nectow v. Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); 8 McQuillin, *Municipal Corporations* § 25.05, pp. 12-13.

By definition, the zoning power of a tribal government over non-members on fee lands is discriminatory in that only tribal members have a voice in that government. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). As a result, this is not a case involving inherent sovereignty, but rather it is a case of inherent discrimination. The presence of inherent discrimination makes the implication of those fundamental due process rights recognized by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378 (1987), more crucial. Under the circumstances, it should also make the requests for this Court to adhere to the fundamental aspects of *Oliphant* and *Montana*, seem only reasonable.

CONCLUSION

Extremely important issues are at stake in this case. The Court has an opportunity to restore some consistency and predictability to the law of jurisdiction over non-members of a tribe within Indian country. The Ninth Circuit has erroneously interpreted Supreme Court precedent in a manner guaranteed to create more confusion and ill will in Indian country. This Court should reverse the decision in *Yakima Indian Nation v. Whiteside* and find exclusive jurisdiction within the county to impose civil land use regulations on non-member owners of fee land within the Yakima reservation.

Respectfully submitted,

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